



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 1, 1996

Mr. Terrence S. Welch
Vial, Hamilton, Koch & Knox, L.L.P.
1717 Main Street, Suite 4400
Dallas, Texas 75201-4605

OR96-1373

Dear Mr. Welch:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 40672.

You represent the Town of Flower Mound (the "town"), which has received several requests for information. The requestors have asked for a variety of information, including records of the billing done by a consulting firm hired by the city, internal investigations conducted by the city, and disciplinary actions taken against police officers. You state that you have released most of the requested records, but that the remaining information is protected from disclosure pursuant to sections 552.101, 552.102, 552.103, and 552.108 of the Government Code. You have submitted the records at issue to this office for review purposes.

You contend that the documents in Exhibits 10 and 13 are excepted from disclosure pursuant to section 552.108. Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and [a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution." Gov't Code § 552.108. You may withhold most of the documents in Exhibits 10 and 13 from disclosure. *See Holmes v. Morales*, 39 Tex. Sup. Ct. J. 781, 1996 WL 325601 (June 14, 1996).

However, access to the polygraph information is governed by section 19A of article 4413(29cc), V.T.C.S. Section 19A provides:

- (a) Except as provided by Subsection (c) of this section, a licensed polygraph examiner, licensed trainee, or employee of a licensed polygraph examiner may not disclose to another person information acquired from a polygraph examination.

(b) Except as provided by Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.

(c) A licensed polygraph examiner, licensed trainee, or employee of a licensed polygraph examiner may disclose information acquired from a polygraph examination to:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person, firm, corporation, partnership, business entity, or governmental agency that requested the examination;

(3) members or their agents of governmental agencies such as federal, state, county, or municipal agencies that license, supervise, or control the activities of polygraph examiners;

(4) other polygraph examiners in private consultation, all of whom will adhere to this section; or

(5) others as may be required by due process of law.

(d) A person for whom a polygraph examination is conducted or an employee of the person may disclose information acquired from the examination to a person described by Subdivisions (1) through (5) of Subsection (c) of this section.

(e) The board or any other governmental agency that acquires information from a polygraph examination under Subdivision (3) of Subsection (c) of this section shall keep the information confidential.

Since the examination was conducted for the town, section 19A (d), rather than chapter 552, governs access to the polygraph records in Exhibit 13.

Exhibit 13 also contains billing statements from Parker Jones, Inc. to the city, which are not protected from disclosure under section 552.108. You contend that these records may be withheld from disclosure pursuant to section 552.103(a). To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. You have shown that litigation is pending and that the billing records are related to the litigation. We have marked a sample statement showing the portions of the billing statements that may be withheld from disclosure under section 552.103(a). The remaining portions of the

billing statements, which show the times and amounts billed to the governmental body, must be disclosed.

You assert that section 552.101 of the Government Code provides an exception from disclosure for some of the information in Exhibit 15 concerning incidents or offenses investigated by the police department. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision. We agree with your assertion that the addresses listed for the specific offense reports you have described in your letter are excepted from disclosure.

Former section 51.14 of the Family Code is applicable to some of the information at issue. Law enforcement records concerning juvenile conduct that occurred prior to January 1, 1996 are generally made confidential under former section 51.14 of the Family Code and thus are excepted from required public disclosure under section 552.101 of the Government Code. Thus, information concerning juvenile conduct that occurred prior to January 1, 1996, is confidential and may not be disclosed. We note that this section was repealed, however, by the Seventy-fourth Legislature. Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 100, 1995 Tex. Gen. Laws 2517, 2590. The Seventy-fourth Legislature replaced these provisions concerning juvenile criminal records with section 58.007 of the Family Code, which does not provide for confidentiality of law enforcement records concerning juvenile conduct that occurred on or after January 1, 1996. See Open Records Decision No. 644 (1996).

Section 261.201 of the Family Code may be applicable to some of the information. Section 261.201(a) provides that the following information is confidential:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Thus, information concerning alleged or suspected child abuse or neglect and the records used or developed in such investigations are confidential and must be withheld from disclosure.

You have also asserted that other addresses are excepted from disclosure pursuant to common-law privacy as encompassed by section 552.101 of the Government Code. The test for whether information should be withheld from disclosure under common-law privacy is whether the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977). We agree that the remaining addresses, which pertain to incidents of possible suicides, suicide attempts, threats of suicide, and sexual assault, must be withheld from disclosure on the basis of common-law privacy. See Open Records Decision Nos. 422 (1984) at 2; 393 (1983); 370 (1983); 339 (1982); 262 (1980) at 2.

You contend that a memorandum under Exhibit 16 is excepted from disclosure by common-law privacy under sections 552.101 and 552.102. The test to determine whether information is private and excepted from disclosure under common-law privacy is the same under both sections 552.101 and 552.102. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

We have reviewed the memorandum at issue. As the record concerns the job performance of a public employee, it is of legitimate public interest. Open Records Decision Nos. 579 (1990) at 7 (purpose of Open Records Act best served by releasing even uncertain information when it relates to public's business); Open Records Decision Nos. 470 (1987) at 4 (public has a legitimate interest in the job performance of public employees); 423 (1984) at 2 (scope of public employee privacy is narrow); see also *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994) (Texas does not recognize tort of false-light invasion of privacy). Thus, the memorandum may not be withheld from disclosure under the common-law privacy provisions of either section 552.101 or 552.102.

You have also asserted that the memorandum is excepted from disclosure pursuant to section 552.103(a). However, once information has been obtained by the opposing party to potential litigation, no section 552.103(a) interest generally exists with respect to that information. Open Records Decision No. 349 (1982) at 2. As it appears that the document at issue was given to the opposing party in the pending litigation, the information at issue may not now be withheld from disclosure under section 552.103.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 40672

Enclosures: Marked documents

cc: Ms. Kristine Hughes
Senior News Editor
Harte-Hanks Community Newspapers
P.O. Box 308
Lewisville, Texas 75067
(w/o enclosures)

cc: Mr. Greg Jones
(w/o enclosures)